IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. .....

TINDARO CHARLES GAGLIO,

Petitioner,

against

THE CITY OF NEW YORK,

Respondent.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Reports of Opinions by Courts Below

Judge Conger dismissed the original complaint as to the defendant Fiorello H. LaGuardia, individually, and as Mayor of the City of New York, relying upon a decision of Mr. Justice Wasservogel which stated (110 N. Y. L. J. 1233 [November 6, 1943]):

> "No cause of action is alleged against the defendant LaGuardia either individually or as Mayor of the City of New York. Motion to dismiss complaint granted. Order signed."

Judge Conger also denied plaintiff's motion to amend his complaint.

Judge BRIGHT vacated service and struck from the records plaintiff's amended complaint which had been served pursuant to Rule 15 of the Federal Rules of Civil Practice.

Judge CAFFEY, who presided at the trial of this action, set aside the verdict of the jury and directed a verdict for defendant upon the following finding (pp. 970-971):

> "As I see it, there are two grounds with respect to which, as I also see it, there is no substantial evidence to sustain the plaintiff's contentions. The first is as to the immunity statute. The testimony there, as I construe it, is without any substantial contradiction that this defendant in utmost good faith attempted to obey this law. That statute was enacted by the Legislature for the obvious purpose of encouraging citizens to comply with this statute as best they could. It came up suddenly, it was a new thing, and the Legislature made this provision about good faith, making that the test. I just don't see with all that flood of witnesses, with all that organization that they have, constantly, constantly, constantly—the defendant cannot be so insane as to waste all that time and do all those things unless it were the purpose to try to obey this law in good faith. That is all they were required to do so far as liability was concerned.
>
> Again, if you just read paragraph 30 of this complaint, and as I read that paragraph, the plaintiff himself describes what he did in a way that within the meaning of the decisions of the Court of Appeals of New York State constitutes contributory negligence as a matter of law."

The Circuit Court of Appeals, with opinion by Judge AUGUSTUS N. HAND, affirmed the judgment of the Court below upon the ground that the New York State War Emergency Act (L. 1942, Ch. 544, Sec. 40) afforded immunity to the defendants, stating that to be the only question "that we need decide" (*Gaglio* v. *City of New York*, 143 Fed. [2d] 904).

Grounds of Jurisdiction

The ground of jurisdiction of the original actions is "diversity of citizenship", the plaintiff claiming residence in Hoboken, New Jersey, and the defendant in New York.

The right to apply to this Court for writ of certiorari is claimed under Section 240-a of the Judicial Code, as amended by Act of 1925, Ch. 229, Sec. 1; 43 Stat. 938, 28 U. S. C. A. Sec. 347-a.

Statement of Material Facts

1—Nature of Action

This is a personal injury action brought to recover $200,000 damages, which the plaintiff claims he sustained when he fell to the tracks and was run over by a southbound elevated railway train at the 183rd Street and Third Avenue station of the Third Avenue Division of the New York City Transit System, operated by the Board of Transportation, at 3.40 A. M. on the morning of October 14, 1942.

The plaintiff originally commenced two actions, on identical complaints, alleging "negligence and nuisance", one in the New York State Supreme Court and the other in the United States District Court for the Southern District of New York. Both were begun on October 13, 1943. He named four defendants: (1) The City of New York; (2) Board of Transportation of the City of New York; (3) Fiorello H. LaGuardia, individually and as Mayor of the City of New York; and (4) Martin Malley, the motorman of the train involved (Extract of Clerk's Minutes, R. 1017).

2—Substance of Negligence Alleged

The complaints alleged that wartime "dimout" lighting regulations were in effect (Complaint, par. 10; R. A-6) and

that the station platform "was extremely dark, and that the plaintiff was unable to see the edge of the platform" and fell to the roadbed as he walked forward from his seat on a bench to board a southbound train (Complaint, par. 30; R. A-9). The alleged darkened condition was claimed to constitute "negligence" and to create a dangerous condition to the public which amounted to a "nuisance".

3—Nature of the Defense

The defendants claimed (1) that although "dimout" lighting regulations were necessarily in effect, there nevertheless was plenty of light to enable passengers to see the edge of the platform and to board and alight from trains with reasonable safety; (2) that the New York State War Emergency Act, Section 40, created immunity from liability for personal injury resulting from complying with or attempting to comply with wartime "dimout" regulations; (3) that the plaintiff was guilty of contributory negligence as a matter of law if he did what he said that he did, namely, arise from a bench, walk forward at a time when he claims that it was so dark that he could not see where the edge of the platform was and fall to the tracks preparatory to boarding a train that he heard approaching but which had not reached the station platform yet; and (4) that the recovery by the plaintiff was barred because he had failed to serve a "Notice of Claim and Intention to Sue" within six months from the date of the accident, as required by statute before an action could be maintained against the City of New York (New York City Administrative Code, Sec. 349a-1.0, subd. e; Laws of 1937, Ch. 929).

4—Plaintiff's Evidence as to Accident

The plaintiff's case, as to the manner of the accident, rests entirely upon his own testimony, and as to the lighting conditions, upon the testimony of the plaintiff and a

witness named Dellafamine, who arrived at the station after the accident. The plaintiff claims that it was in September, 1943, eleven months after the accident, before he could recollect anything about what had happened (R. 246). Even then his ideas were very confused and uncertain, as shown by the testimony which he gave when examined by the Corporation Counsel's office on October 1, 1943, in connection with the claim for damages that he had filed against the City of New York, wherein he said (Plaintiff's Ex. 14, R. 979; admitted R. 168):

> "Q. Will you tell me just what happened? A. Frankly speaking, I cannot remember exactly yet.
>
> Q. To the best of your ability? A. As I remember I was going home. I heard the train coming, and as I heard the train coming I was sitting on the bench. I got up from the bench and walked toward the front of the platform, and all of a sudden I found no ground underneath me, and that's the last I remembered.
>
> Q. What was the next you do remember? A. You see, everything is blank to me right now. It is in fact coming a little back now, more than it did before. The next thing I recall, at the present time, is getting up and finding myself in bed in the hospital."
>
> * * * * *
>
> "Q. Is there anything further you can tell me about the accident? A. Things are starting to come back just a little, just like a jigsaw puzzle. I have been trying to put the pieces together. It is like a cloud that starts clearing up. I imagine I will be able to recall everything, which I hope. I sit here and think and think and think. It gives me plenty of headaches."

When the plaintiff testified in Federal Court in February, 1944, he said that he was thirty-eight years old (R. 162); that his regular occupation was that of a clothing worker (R. 161); that on the evening of October 13, 1942, he went to the home of his sister, Mrs. Nicolosio, in the Bronx for dinner (R. 162, 163); that a friend named Perlungo was there, together with the plaintiff's brother-in-law (R. 163); that they had some wine with their dinner and

afterward went to the cellar of another friend nearby where they worked making wine until 3 A. M. (R. 163, 164). Then Perlungo boarded a bus and Nicolosio accompanied plaintiff as far as the foot of the stairs of the elevated railway station (R. 165, 495, 496).

As to what happened to him after that his recollection seems to be just as limited as in the version he gave to the Corporation Counsel. He said:

> "Q. Will you tell us just what happened after you left, and how far you went with these men? A. We went to a corner and we waited for a bus, so that Mr. Perlungo would go home, and after we waited for the bus and Mr. Perlungo boarded it, we proceeded to go toward the Third Avenue Elevated so I could go home, but at the present time I was staying at the Rutledge Hotel, 30th Street and Lexington Avenue. I traveled on the Third Avenue Railway. And we walked toward Third Avenue, and at the bottom of the stairs my brother-in-law said good night to me and I walked up and went up to the station and paid my fare, walked in and I got on the platform and sat down. I heard the train coming and as I heard the train coming I got up to meet it, to board it, and all of a sudden I found myself in the air. That is the last I remember."

The plaintiff said that he had been sitting on a bench toward the northerly end of the station (R. 165).

5—Defendant's Evidence as to Accident

The defendant showed that the accident did not happen near the bench at the northerly end of the station at all, but down near the southerly end, about 10 to 20 feet in front of the place where the front car of the southbound train made its regular stop, a distance of over 130 feet (R. 431); that it did not occur while the train was entering the station, but after the train had made its regular stop, started up again and proceeded about 5 feet when the

tripper device on the front of the first car came in contact with some object on the track which automatically set the emergency brakes and stopped the train (R. 321, 321-A). On investigation, the unconscious body of the plaintiff was found lying out of sight underneath the overhanging portion of the station platform with his back up against one of the horizontal steel girders that support the flooring (R. 322, 323). Only his left leg and a portion of his right foot were near the westerly rail of the track (R. 324).

Police Detective Knecht, who had been assigned by the Police Department to ascertain whether the plaintiff's presence on the tracks was caused through foul play or criminal act, interviewed the plaintiff at the hospital at about 5 A. M. on the day of the accident. He testified (R. 495, 496):

> "Q. What happened at Fordham Hospital? A. Well, I wanted to get some sort of a statement from the injured man, and at that time he was in an oxygen tent, and I inquired if it was all right to speak to him, and I was told it was okay to speak to him for a few minutes. And I asked him what had happened to him, and he told me, he said, well——
>
> Q. Yes. A. Well, he told me, he said he had been drinking a bit that evening. I asked him what he had been drinking. He said beer and wine. He said he had been over to the East Side—he said he had been over the neighborhood to the East Side, and he stopped and saw different friends, and he said somebody walked him to the el station, and he said he went up on the platform and he said he laid down on a bench. He said, 'I must have fallen asleep because the next thing I knew I think I rolled off the bench. The next thing I remember after that I imagined there was a monster standing over me.' I asked him about what time he figured he got to the station. He said he thought it was around eleven that evening."

Detective Knecht interviewed him again about two days later to see if he had recollected anything else, but the injured man said that he had nothing else to add to his

story and that he could not explain where he had been between 11 o'clock and 3.40 A. M. when the accident happened (R. 497).

The Fordham Hospital record contained the following entry (R. 822):

> "Very little history is given us except the patient was out drinking with brother-in-law."

6—Plaintiff's Evidence as to Lighting Conditions

The plaintiff said that when he came on the platform he "noticed it was dark" and looked up to see what the trouble was and "noticed the lights were not even" and that they were "unevenly spaced" (R. 166, 258).

On cross-examination he said that he didn't see the train but just heard it; that he "couldn't see that night" (R. 249). When he got off the bench, he said, "At that time I couldn't see. I was looking out very carefully to board the train" (R. 250). He couldn't recall whether there were any lights on the stairs or not (R. 253) but said it was light in the station (R. 253) and when he went through the turnstiles "it was very light there" (R. 253).

The witness Dellefemine arrived at the station after the accident, when the train was jacked up and when all the D. C. lights that got their power supply from the "contact rail" were out because the power had been shut off to enable the injured man to be rescued (R. 810). He said that it was very dark but that there were lanterns on the platform where the train was jacked up (R. 95); that he used the station every morning and had noticed that when he sat on the bench and wanted to observe the time from his wrist watch he had to "go this way" (indicating) (R. 96). There was a light two feet ahead of the bench (R. 96). On the morning of the accident he noticed "that there was light overhead on the platform", that "cast more of a flashlight beam". He saw no lights along the edge of the platform (R. 97).

7—Defendant's Evidence as to Lighting Conditions

The City showed by much uncontradicted testimony that the "dimout" lighting at the 183rd Street Elevated Railway station was installed because of, and conformed to, the requirements of the United States Army, bringing the defendant within the immunity provisions of the New York War Emergency Act. Also that the lighting was sufficient to enable the yellow line, which had been painted along the entire edge of the platform, to be easily seen, and to permit passengers to board and alight from the trains with reasonable safety. The testimony is summarized hereinafter under Point 3, at page 15 of this brief.

POINT I

Writ of certiorari should not be granted because the questions involved do not bring the case within the purview of the Federal statute governing issuance of the writ (28 U. S. C. A., Sec. 347-a) or of the Revised Rules of the Supreme Court of the United States (Rule 38, Sec. 5, subds. a, b, c).

The Circuit Courts of Appeal in the nine circuits throughout the United States were created for the purpose of relieving the Supreme Court of the "oppressive burden" of general litigation. It was intended that their judgments and decrees should be final in a large portion of the cases that formerly came to the Supreme Court as a matter of right. Cases in which the jurisdiction depended entirely upon diversity of citizenship (such as the present case) fell in that category.

The purpose of reserving to the Supreme Court the right to bring to itself for decision or review, as provided in 28 U. S. C. A. Sec. 347-a, was not to give the defeated party another hearing but to promote uniformity of decision

among the various Circuit Courts, and to bring up cases of national or international interest and of gravity and importance, which it is in the public interest to have decided by the court of last resort (*Magnum Importing Co.* v. *Coty* [1923], 262 U. S. 159).

Rule 38, Sec. 5, subds. a, b and c, of the Revised Rules of the Supreme Court of the United States, which deals with writ of certiorari, provides as follows:

> "5. A review on a writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicates the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probable not in accord with the applicable decisions of this court.
>
> (b) Where a circuit court of appeals has rendered a decision in conflict with the decisions of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.
>
> (c) Where the United States Court of Appeals for the District of Columbia has decided a question of general importance, or a question of substance relating to the construction or application of the Constitution, or a treaty or statute, of the United States, which has not been, but should be, settled by this court; or where that court has not given proper effect to an applicable decision of this court."

The facts in the present case seem to fall far short of bringing it within the above rules.

The petition claims that one of the questions meriting review by this Court is the application of the "dimout" order of Major General Terry. It is stated in Point 2 (p. 10) that the courts seemed confused as to the territory to which the order applied. The only confusion, however, seems to be in the mind of counsel. He has argued repeatedly that the order refers only *to lights visible at sea one mile from shore,* over a coastal area beginning at Rocky Point, in Long Island Sound, and extending eastward around Montauk Point, Long Island, then along the south shore to Fort Hamilton and Staten Island, and down the Jersey coast. He claims that because the lights at the 183rd Street station are twenty miles from the sea and cannot be seen, that it is ridiculous to apply the "dimout" regulations to them.

The fact is that the order of Major General Terry specifically states the *zone* for New York State in paragraph 2-a. It is as follows:

> "In the State of New York: Suffolk, Nassau, Queens, Kings, Richmond, New York, Bronx and that part of Westchester County lying south of Mount Pleasant Township, inclusive."

The 183rd Street Elevated Railway station is located in Bronx County. The section of the order that the petition refers to is paragraph 1, which defines the term "Coast Line", not the "zone".

The portion of the order that defines the amount of light permitted is paragraph 6, which states that *all lights* shall be reduced in volume, number and voltage, and that the combined lighting "may not exceed the average of one-quarter watt per square foot" (R. 986-988). See also the testimony of Engineer Dorting (R. 868, 869).

POINT 2

The Federal Rules of Civil Practice (Rule 50-b) specifically authorize the Court to reserve decision and to set aside a jury verdict and direct judgment after verdict. The Trial Judge, in following that rule, did not deny to the petitioner his right to trial by jury, as claimed by the petition (Point I, at p. 7).

The Federal Rules of Civil Practice, Rule 50-b, provides as follows:

"Rule 50—Motion For Directed Verdict.

(b) Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the Court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within ten days after the reception of a verdict a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned, such party, within ten days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the Court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the Court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

This practice existed even under the Common Law, and has been definitely approved recently by this Court (*Baltimore & Carolina Line* v. *Redman* [1935], 295 U. S. 654; *Galloway* v. *United States* [1934], 319 U. S. 372). In both

cases the Court rejected the argument that the plaintiff had thereby been deprived of his right to trial by jury under the "Seventh Amendment of the Federal Constitution". The controlling factor was the reservation of decision by the Trial Judge. If the defendant's motion for a directed verdict had been denied without reservation of the question of the sufficiency of the evidence, and the verdict had been taken unconditionally, then the Appellate Court would have no right to direct a verdict (see *Slocum* v. *New York Life Ins. Co.* [1912], 228 U. S. 364).

But, as in the present case, where Judge CAFFEY reserved decision both at the close of the plaintiff's case and of the whole case, it is considered that the matter was submitted to the jury conditionally and subject to the right of the Court to afterward pass upon the question of law as to the sufficiency of the evidence. By doing so he is not deciding a question of fact, but a question of law (*Baltimore & Carolina Line* v. *Redman* [supra]). In that case the Court used the following language (at pp. 659, 660):

> "At common law there was a well established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved; and under this practice the reservation carried with it authority to make such ultimate disposition of the case as might be made essential by the ruling under the reservation, such as non-suiting the plaintiff where he had obtained a verdict, entering a verdict or judgment for one party where the jury had given a verdict to the other, or making other essential adjustments."
>
> "Fragmentary references to the origin and basis of the practice indicate that it came to be supported on the theory that it gave better opportunity for considered rulings, made new trials less frequent, and commanded such general approval that parties litigant assented to its application as a matter of course. But whatever may have been its origin or theoretical basis, it undoubtedly was well established when the Seventh Amendment was adopted, and therefore must be re-

garded as a part of the common-law rules to which resort must be had in testing and measuring the right of trial by jury as preserved and protected by that Amendment."

In distinguishing the *Slocum* case (supra) the Court said at pages 658, 659:

"A very different situation is disclosed in the present case. The trial court expressly reserved its ruling on the defendant's motions to dismiss and for a directed verdict, both of which were based on the asserted insufficiency of the evidence to support a verdict for the plaintiff. Whether the evidence was sufficient or otherwise was a question of law to be resolved by the court. The verdict for the plaintiff was taken pending the court's rulings on the motions and subject to those rulings. No objection was made to the reservation or this mode of proceeding, and they must be regarded as having the tacit consent of the parties. After the verdict was given the court considered the motions pursuant to the reservation, held the evidence sufficient, and denied the motions."

In the present case Judge CAFFEY reserved decision, thereby following what the United States Circuit Court of Appeals, Second Circuit, recently held to be "the better practice". See *Fratta* v. *Grace Line, Inc.* (1943), 139 Fed. (2d) 743, wherein the Court said, at page 744:

"We take this occasion to suggest to trial judges that, generally speaking—although there may be exceptions—it is desirable not to direct a verdict at the close of the evidence, but to reserve decision on any motion therefor and allow the jury to bring in a verdict; the trial judge may then, if he thinks it improper, set aside the verdict as against the weight of the evidence and grant the motion, Federal Rules of Civil Procedure, rule 50(b), 28 U. S. C. A. following section 723c, with the consequence that if, on appeal, we disagree with him, we will be in a position to reinstate the verdict, thus avoiding the waste and expense of another trial."

POINT 3

Judgment for the City was properly directed and affirmed upon the ground that Section 40 of the New York State War Emergency Act grants immunity to the municipality from liability for injury to any person as a result of the City's complying with or attempting in good faith to comply with "dimout" regulations.

In substance, plaintiff's whole case rested on the theory that the City acted in bad faith in its administration of the Army's "dimout" regulations. We shall show that this theory is not borne out by the facts in this record.

The New York State War Emergency Act is L. 1942, Ch. 544, and became effective May 1, 1942. The section relevant to this case is Section 40, which provides as follows:

> **"Sec. 40. Immunity from liability.**
>
> 1. Neither the state nor any municipality thereof, nor their agencies, agents or representatives, nor any member of a municipal or volunteer agency, nor any individual, partnership, corporation, association, trustee, receiver or any of the agents thereof, in good faith carrying out, complying with or attempting to comply with any law or duly promulgated rule, regulation or order as defined in subdivision eleven of section two of this act or any federal law or any order issued by federal or state military authorities relating to civilian protection, shall be liable for any injury or death to persons or damage to property as the result of such activity.
>
> The foregoing shall not affect the right of any person to receive benefits to which he might otherwise be entitled under the workmen's compensation law, any pension law or the general municipal law, nor the right of any person to receive any benefits or compensation under any act of congress.
>
> 2. The provisions of section seventy-one of the general municipal law shall be inoperative and shall not apply with respect to property destroyed or injured by mobs or riots."

On June 1, 1942, after observation of extensive tests by Army Engineers, Major General Terry, Commander of the Second Corps Area of the Eastern Defense Command of the U. S. Army, issued "Regulations Governing the Control of Artificial Lighting" in the sea coast zone, which included New York City (R. 986-988). The "Regulations" provide (pars. 5, 6) that lights "shall be reduced in volume, number, wattage to a minimum consistent with their purpose, and shaded so as to prevent their direct rays shining at an angle above the horizontal", and that the combined lighting of the area "may not exceed the average of ¼ watt per square foot". The "State and Local Authorities" are designated to enforce these regulations (Sec. 12).

The City of New York was, therefore, obliged to comply with the wartime "blackout" and "dimout" regulations.

1. Evidence of precautionary measures taken in compliance with Major General Terry's dimout order of June 1, 1942

The uncontradicted testimony of Electrical Engineer Emil E. Dorting, Supervisor of Lighting for the New York City Transit System, shows that "dimout" lighting on the rapid transit lines of New York City was installed pursuant to the U. S. Army orders, under Federal authority, issued in the interests of national defense and for no other reason. Mr. Dorting is a man of eminent qualifications and long experience. He is a member of the American Institute of Electrical Engineers, the Illuminating Engineers Society, past president of the New York Electrical Society, and an advisor to the U. S. Army Engineering Board at Fort Belvoir, Virginia (R. 276). In describing the events, after Pearl Harbor, that led up to the "blackout" lighting and for the urgent necessity for "dimout" lighting and the reduction of "sky-glow" in New York, he stated that on December 8, 1941, the day after Pearl Harbor, an immediate order was put into effect on the West Coast to turn out all lights because of fear of enemy air raids (R. 761),

and General Superintendent Pfeifer asked Engineers Gardner and Dorting to conduct a series of tests to determine an approved system which could be used on the transit system in New York in the event of air raids (R. 762).

Later, about January 15, 1942, the first inquiry came from the Army. Major Everett, Executive Officer of the Army Engineer Board at Fort Belvoir, Virginia, sent Capt. Kamy to New York (R. 762) for a conference with our engineers (R. 764). Various tests were made, first with reference to "blackouts" and later with reference to "dimouts" (R. 764, 765). Both laboratory tests and actual experiments at outdoor stations on the Pelham Division were made under operating conditions.

About January 29, 1942, the City was told that it would be necessary to cooperate with Col. Lewis Robbe, in charge of the Office of Civilian Defense in this district, and later, at his request, numerous engineers of lamp companies and scientific laboratories and public officials were invited to observe the result of tests for "blackouts" and "dimouts". The first demonstration for the benefit of the United States Army officers and other public officials was given on April 9, 1942. Through the Mayor and Police Commissioner, a test "blackout" was arranged for the Bronx between 9 and 9.30 P. M. Through Col. Robbe and officials of the Army Interceptor Command arrangements were made for airplanes to fly overhead and observe the results of the tests (R. 770).

A train, consisting of four cars, each equipped with a different form of "blackout" lighting, was made up, and the observers—about 200 people—made two round trips from 177th Street with stops at Middletown Road, Buhre Avenue and Pelham. The train stopped at each station so that the observers could get off the train, walk down the stairs to the street and return to the platform and train again (R. 772). These stations were equipped for the tests with the same "blackout" lights that were subsequently installed on all outdoor stations, including the 183rd Street station at which the accident occurred (R. 798).

In order to increase the visibility of the edge of the platform, a yellow line 4 inches wide was painted over its entire length (R. 774). Measurements of the visibility of the platform made with an especially built "low brightness illuminator" (R. 777) showed that without the yellow stripe on the edge of the platform there was only about 5% of reflectivity of illumination, but with the same amount of light falling on the yellow line there was 55% of light returned, showing a ratio of 11 to 1 (R. 778). In other words, it built the light up "eleven times according to [the] tests" (R. 778). The effect with just the "blackout" lights on was that the yellow line was visible "the entire length of the platform" (R. 778). Dorting stated, "You could see it under moonlight, starlight" (R. 779).

Army officers present at the test were Col. Robbe, in charge of Civilian Defense, Capt. Kamy, representing the Army Engineer Board at Fort Belvoir, Virginia, and several officers from the Interceptor Command at Mitchel Field. There were also present electrical engineers from the Association of American Railroads, whose chairman was Mr. William Hamilton of the New York Central Railroad, and from the General Electric Company, the Western Electric Company and Mr. William Little of the Electrical Testing Laboratory. That laboratory is an accredited scientific laboratory for approving lighting equipment before it can be sold. The laboratory represents the Army Engineer Board (R. 775-777).

As to "dimout" lighting and the circumstances under which the Army first gave any instructions for its establishment, Mr. Dorting stated that, about May 16, 1942, Mr. Pfeifer, his general superintendent, received a call to be at the Mayor's office as soon as possible. He took engineers Reed, Sinclair and Dorting with him. Dorting testified that "the Mayor had received an urgent call from the Commanding General of the Second Corps Area. I think it was Major General Terry at the time—whoever was the commanding general—that several ships in rela-

tively close proximity had been torpedoed off the Jersey Coast and that immediate steps were to be taken to reduce sky-glow over the entire City, and where lights could be seen along the shore they were to be extinguished immediately" (R. 791-792). The theory was that ships were being silhouetted against the sky-glow at night, making the danger of being torpedoed greater (R. 792).

In order to comply with these orders, further tests were made, and in about eight or nine days another demonstration was had. "No specifications" were furnished. "It was a demonstration" that was given to the Army, and Inspector Wellender (R. 793, 794). "It was an emergency." "It was very sudden" (R. 794). Actual details were first published by the Army on June 1, 1942 (R. 795).

Dorting testified that the lights left burning on the 183rd Street station platform consisted of two rows of 36-watt lights 15 feet apart, with 1¼-inch openings, and one row of 10-watt lights, 20 feet apart, with ⅝-inch openings (R. 797-800).

The defendant's evidence showed that, as a result of the tests that were conducted by the Army officials and other public and private officials and engineers consulted, the yellow stripe along the edge of the station platform was clearly visible even when only the 10-watt "blackout" lights were lighted (R. 800), and that when the two rows of 36-watt "dimout" lights were on (which was the condition at the time of the accident) the light on the station platform was increased fifteen times (R. 800). As shown below, many witnesses called by the defendant testified that the edge of the station platform was visible for a considerable distance, and that they had no difficulty in seeing where they were walking *on the night of the accident:*

Motorman Malley said that he was able to see the back and middle of the platform (R. 327) and the yellow stripe running along the edge (R. 329).

Police Sergeant Baccagline stated that with the "dimout" lights in effect he was able to see his way as he walked

along the platform and could see the edge of the platform (R. 380, 381).

Conductor Carney said that he could see easily 50 feet ahead of him (R. 403). He saw the yellow stripe which extended the entire length of the platform and he had no difficulty in looking across the width of the platform (R. 404).

Photographer Wood, who took the night photographs of the site in issue (Defendant's Exs. 28 and 29), said that they correctly represented the light as it actually appeared with the "dimout" lights in effect (R. 453, 454). He said that he could see approximately 60 to 70 feet along the platform (R. 456).

Police Detective Knecht said that he arrived at the station at 4.30 A. M. the night of the accident; that with "dimout" lighting in effect he could see where he was walking on the platform (R. 498).

Police Detective Kerins, who was with Detective Knecht, said there was sufficient light and that he could see the full width of the platform and the edge of the platform, and that he noticed the yellow line there (R. 530, 531).

Lighting Inspector Flood, who made the regular inspection of the lights at 7.20 P. M. on the night of October 13, 1942 (the day before the accident), said that no bulbs were burned out; that with the "dimout" lights on he was able to see his way about and could see the yellow line with the "dimout" lights right over it (R. 545, 550, 552), and that the night photographs correctly represented the condition of the lighting as it appeared on the evening of October 13, 1942. These photographs will be handed to the Court at the time of argument.

Light Inspector Murphy, who made a special inspection of the lighting at the station on the night of the accident between 4.30 A. M. and 5 A. M., said that none of the bulbs was burned out and that he was able to see where he was walking and where he was putting his feet (R. 576, 577).

Station Agent McNamara, who had charge of the station from 3 P. M. to 11 P. M. on the nights of October 13th and 14th, 1942, and who made a regular inspection each night (R. 671, 674), said that he was able to see where he was putting his feet as he walked along and that he saw the yellow stripe along the edge (R. 678, 679).

Porter Hayes, who cleaned the station on the nights of October 13th and 14th, 1942 (R. 707), said that he walked around the platform doing his work; that he could see to sweep and see where he was putting his feet, and that he saw the yellow line (R. 703, 707, 708).

Assistant Dispatcher Mabey said that he arrived at the station about 3.55 A. M. on the morning of the accident (R. 722) and that he was able to see along the platform even though some of the lights (*i.e.*, direct current lights) were put out by shutting off the power from the third rail while removing plaintiff from the tracks. He also testified that the yellow stripe along the edge of the platform was clearly visible (R. 726-727).

Judge Caffey said, when granting the motion for a directed verdict (R. 970):

> "The testimony there, as I construe it, is without any substantial contradiction that this defendant in utmost good faith attempted to obey this law. That statute was enacted by the Legislature for the obvious purpose of encouraging citizens to comply with this statute as best they could. It came up suddenly, it was a new thing, and the Legislature made this provision about good faith, making that the test. I just don't see with all that flood of witnesses, with all that organization that they have, constantly, constantly, constantly—the defendant cannot be so insane as to waste all that time and do all those things unless it were the purpose to try to obey this law in good faith. That is all they were required to do so far as liability was concerned."

2. Plaintiff's failure to prove any act of negligence on the City's part

A fair reading of the record on appeal shows that plaintiff was wholy unable to prove any act of negligence on the City's part. Negligence could not properly be imputed to the City for the dimmed-out condition of the station lights, under the conditions here existing, as we have shown herein above. The record shows that the City took the extra precaution of painting a yellow line along the outer edge of the station platform—an act not required by the regulations promulgated by the United States Army (R. 753). There is nothing in the record to show that the motorman of the train operated it in a negligent manner or that the safety appliances on the train were not in perfect working condition. Since there was no eyewitness to the accident, plaintiff's own testimony must be searched for evidence of negligence, if there was any. The mere fact that plaintiff testified that the lights which were turned on at the station platform "were unevenly spaced" is not testimony that the "dimout" was in any respect improper. Here again we call attention to the enormous volume of testimony by the City's witnesses that the "dimout" was in compliance with the Army Regulations that the combined lighting of this area could "not exceed the average of ¼ watt per square foot" (R. 789-803), and that in complying with the "dimout" regulations all due care was taken by the City to keep the station safe and the platform visible. The overwhelming testimony in the case was that the edge of the platform was clearly visible to persons whose sense of sight was properly disposed and rightly employed. The fact is that over 100,000 persons had, prior to the accident, used the station in question without mishap due to the "dimout" (R. 658).

Plaintiff's counsel has sought to draw the inference that some of the lights were out. The defendant submits that such an inference is entirely unjustified, because the evidence given by defendant's Lighting Engineer, Dorting,

shows that there were three rows of lights, two of which were spaced 15 feet apart and one of which (the 10-watt "blackout" lights) were spaced 20 feet apart. In addition, we have the positive testimony of Light Inspectors Flood, who inspected the lights at 7.40 P. M. on October 13, 1942, and Murphy, who made a special inspection of the lights immediately after the accident, between 4.30 A. M. and 5 A. M. on October 14, 1942, and on both inspections no bulbs were found to be burned out (R. 546, 577).

The attention of the Court is respectfully called to the decision of this Court in the case of *The Fin MacCool,* 147 Fed. 123 (1906), wherein the rule that affirmative and positive testimony as to the existence of a fact dependent upon the senses of sight or hearing must be deemed controlling over purely negative testimony that the fact did not exist, was applied in a situation where there was conflicting evidence as to the presence or non-presence of a light. The foregoing rule was quoted and followed by this Court in the case of *The Buenos Aires,* 5 Fed. (2d) 425 (1924).

The same rule has been applied for a long time in New York State. See:

Foley v. *N. Y. Cent. R. Co.,* 197 N. Y. 430 (1910);
Culhane v. *Same,* 60 N. Y. 133 (1875);
Capitula v. *Same,* 200 App. Div. 247 (3rd Dept., 1922).

POINT 4

The Trial Court properly directed a verdict for the City on the further ground that the plaintiff's own proofs showed him to have been guilty of contributory negligence as a matter of law.

The plaintiff's testimony at the trial shows, as we have pointed out, that if there was any negligence present it was on the part of Gaglio and not of these defendants.

Judge CAFFEY, in directing a verdict for defendant, made the pertinent observation (R. 971):

> "Again, if you just read paragraph 30 of this complaint, and as I read that paragraph, the plaintiff himself describes what he did in a way that within the meaning of the decisions of the Court of Appeals of New York State constitute contributory negligence as a matter of law. I expressly refrained from mentioning that because I wanted the jury, without any suggestion from me as to the facts, to bring in a verdict and put this case in a position so that if I be in error in the ruling I am going to make on the law why you would have a verdict here so that if the Court of Appeals found that I made a mistake, as a matter of law, it reinstates the verdict without having to try the case over again."

Plaintiff knew that "dimout" regulations were in effect. We submit that no reasonable man would try to board an elevated train before the first car had reached the station platform, yet plaintiff's own testimony shows that he walked forward before he had seen the headlight of the train (R. 164-165). Assuming that he was conscious and that he walked to the edge of the platform into the darkness, we contend that this act constituted contributory negligence as a matter of law. The Trial Court found this to be the case (R. 971). The Appellate Court apparently concurs (see Opinion).

We call attention to numerous cases in New York State holding that such conduct as the plaintiff himself here related in describing his approach to the train constitutes contributory negligence as a matter of law.

In *Piper* v. *N. Y. Central R. R. Co.*, 156 N. Y. 224 (1898), it was held that the plaintiff was guilty of contributory negligence as a matter of law where he groped around in the dark in a sleeping car and, thinking he was opening a closet door, opened a vestibule door and walked off the train. The Court said (pp. 229-230):

"It happened, simply, because, put in its briefest form, the plaintiff, not regarding the darkness of the moment, opened the wrong door of several and walked out of the car, instead of into a closet. Was the company bound to foresee and to provide against such an extraordinary occurrence and such heedless conduct? Practically put, the question is this: Can a man in the full possession of his senses, traveling upon a railroad train and finding himself plunged into darkness, at a moment when groping about in the car, proceed with the same confidence as in the light and be regarded as a prudent man? The question seems to answer itself.

* * * * * *

I think that we must hold, as matter of law, that the plaintiff was guilty of contributory negligence, in utterly failing to use that prudence which was especially incumbent upon him under the circumstances of the situation. The darkness called upon him to use it and had he done so, the accident could not, within any reasonable probability, have happened. A person, whose power of vision is temporarily obstructed by some supervening condition, should take the greater care and should, if it be possible, await its passing away. If he neglects to proceed cautiously, he must accept the consequences of his undue precipitation. The following cases, among others, will suffice as more or less pertinent illustrations: Lafflin v. Buffalo, etc. R. R. Co. (106 N. Y. p. 142); Heaney v. L. I. R. R. Co. (112 id. p. 125); Hilsenbeck v. Guhring (131 id. 674).

Therefore, without discussing at all the question of whether the defendant was shown to have been guilty of some neglect, I think, upon the plaintiff's own showing, that he was himself negligent and that it was error to refuse to dismiss his complaint and to submit the case to the determination of the jury."

In *Owen* v. *Westchester Country Club*, 264 App. Div. 796 (2nd Dept., 1942), aff'd 289 N. Y. 819 (1943), where the plaintiff walked off the terrace in the dark, the Court said (p. 796):

"In an action to recover damages for personal injuries sustained by reason of the alleged negligence

> of defendant whereby plaintiff fell from a brick terrace a distance of two or three feet, when leaving the premises of the defendant, the judgment of the County Court of Westchester County in favor of plaintiff is reversed on the law, with costs, and the complaint dismissed on the law, with costs. Defendant had no duty to illuminate this exterior brick terrace, nor to foresee the accident which occurred. (Indinali v. Lerner, 243 App. Div. 735; McCabe v. Mackay, 253 N. Y. 440). Plaintiff was guilty of contributory negligence, as a matter of law, in failing to retrace his steps, when he found that he was in total darkness, and to proceed through the building and leave by means of a safe exit which was afforded him."

In *Hudson* v. *Church of Holy Trinity*, 250 N. Y. 513 (1929), where plaintiff fell while feeling her way along a dark hall looking for a toilet, Judge POUND wrote (p. 515):

> "Plaintiff's duty in the circumstances was to look out for herself and not to feel her way where it was 'so black and dark that she could not see anything.' She should have refrained from proceeding down the unlighted hallway in unfamiliar surroundings without finding out where she might safely go. She elected to feel her way along in the darkness. She was guilty of contributory negligence as a matter of law. (Rohrbacher v. Gillig, 203 N. Y. 413.)"

In *Weller* v. *Consolidated Gas Co.*, 198 N. Y. 98 (1910), where the plaintiff fell in a passageway because the light was not uniform, Judge WILLARD BARTLETT, in the opinion said (p. 101):

> "Where, as in the case at bar, there is an obvious descent in a passageway which the visitor is about to enter, the very fact that the light therein is not uniform imposes upon the visitor the duty to proceed with circumspection and not move blindly on regardless of what may be ahead. A person who knowingly approaches a step beyond which is a darkened space may not assume that such space is level and proceed without the exercise of any care to ascertain whether it is or not. If he does so, he does so at his own risk.

(Dailey v. Distler, 115 App. Div. 102, and cases there cited.) Although the plaintiff was fully aware of the presence of the first step, her testimony does not really show that she took any precaution whatever to ascertain whether or not there was another. We think she failed to prove the exercise of any degree of care on her own part, and such proof was essential to make out her cause of action.

For these reasons we conclude that the judgment must be reversed and a new trial granted, with costs to abide the event."

Thus, it affirmatively appears that whichever version of the facts this Court may accept, *i.e.*, whether the plaintiff, in full possession of his senses, deliberately walked into the darkness and fell to the tracks, or, after a night of drinking, rolled from the bench on which he was reclining to the tracks, he was guilty of contributory negligence as a matter of law.

POINT 5

Plaintiff's failure to serve a "notice of claim and intention to sue" within six months after the happening of the accident constituted a fatal defect requiring dismissal of his complaint as a matter of law (Administrative Code, Sec. 394a-1.0).

The accident in this case occurred on October 14, 1942. The required notice of claim and intention to sue the City was not served until September 13, 1943—approximately five months too late.

The Administrative Code of the City of New York (L. 1937, Ch. 929) provides that an action against the City for personal injuries resulting from its claimed negligence will not lie unless "a notice of intention to commence such action and of the time when and place where the injuries were received shall have been served in like manner as the

service of a summons in the Supreme Court, within six months after such cause of action shall have accrued, * * *" (Sec. 394a-1.0, subd. c).

The Court of Appeals of this State has repeatedly ruled that litigants will be held to a strict observance of the statutory provisions enacted by the Legislature for the protection of municipalities in actions to recover damages by reason of the alleged negligence of employees or agents of the City. Speaking of such actions, it was said in *Curry* v. *City of Buffalo,* 135 N. Y. 366 (1892), that (p. 370):

> "The whole matter of the maintenance of this class of actions was within the control of the legislature. It could refuse a right of action against municipalities for such injuries, and it could impose any conditions precedent to the maintenance of such actions."

In *Rogers* v. *Village of Port Chester,* 234 N. Y. 182 (1922), the Court, in upholding a dismissal of the complaint for failure to serve a notice within the statutory period, said (p. 187):

> "The court has no dispensing power. Its duty is ended when it determines that the valid, indispensable preliminaries to the maintenance of these actions have been omitted."

The statutory requirement of service of a notice of intention to sue is applicable to actions arising out of the operation by the City of its transit facilities. See *Trust* v. *City of New York,* 285 N. Y. 589 (1941).

CONCLUSION

The judgment appealed from should be affirmed, with costs.

December 23, 1944.

Respectfully submitted,

IGNATIUS M. WILKINSON,
Corporation Counsel,
Counsel for Respondent.

ALBERT L. WILBUR,
of Counsel.